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Supreme Court of the United States

OCTOBER TERM, 1932.

No. 499

THE MOFFAT TUNNEL LEAGUE AND UINTAH BASIN RAILROAD LEAGUE, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *et al.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE.

BRIEF ON BEHALF OF APPELLANTS.

A. REFERENCE TO OPINIONS OF THE LOWER COURT AND DECISIONS OF THE COMMISSION.

This appeal is taken from the decision of the United States District Court for the District of Delaware (three Judge Court). The case is reported:

Moffat Tunnel League, *et al.*, v. United States, *et al.*, 59 Fed. Rep. 2nd 760.

The decisions and orders of the Interstate Commerce Commission involved are reported as follows:

Denver and Salt Lake Railway Company Control (Finance Docket No. 8070), 170 I. C. C. 4 (Opinion).
Same Case 175 I. C. C. 542 (Order).

The Dotsero Cut-Off Case is reported:

Construction by Denver & Salt Lake Western Railroad Company (Finance Docket No. 4555).
154 I. C. C. 51 (Opinion).

Same Case 175 I. C. C. 535 (Order).

After this suit was instituted an order was entered in both Dockets 4555 and 8070 extending the time within which the Rio Grande should comply with the conditions of the Commission's orders, until June 15, 1932 (180 I. C. C. 715), and the time was again extended until September 15, 1932, by Order entered June 14, 1932 (184 I. C. C. 721).

B. STATEMENT OF THE CASE.

1. History of the Litigation.

February 1, 1930, The Denver and Rio Grande Western Railroad Company—hereinafter referred to as the Rio Grande—filed an application with the Interstate Commerce Commission—hereinafter referred to as the Commission—under Sec. 5, Par. 2 of The Interstate Commerce Act (U. S. C. A. Tit. 49, Sec. 5, Par. 2) for an order authorizing the Rio Grande to acquire control of The Denver and Salt Lake Railway Company—hereinafter referred to as the Moffat Road—by stock purchase.

On petition, appellants were each granted leave to intervene in the proceedings before the Commission and thereafter very actively participated in all hearings before the Commission (Ex. C, R. 17, R. 62).

On September 15, 1931, the Commission granted the application of the Rio Grande to acquire control of the Moffat Road (Denver and Salt Lake Railway Company Control, 175 I. C. C. Rep. 542) (Ex. B, R. 13).

Thereupon appellants filed this suit in the District Court of the United States for the District of Delaware (the Rio Grande being a Delaware corporation) to enjoin and set aside the order of the Commission.

The grounds upon which appellants sought to set aside the order of the Commission were that the Commission did

not hold a "hearing" as required by law, on the question of whether the acquisition of control prayed for by the Rio Grande "will be in the public interest", because at the hearings held by the Commission, the Commission refused to receive and refused to consider material and relevant evidence offered by appellants and others, concerning the effect upon "public interest" which such acquisition would have (R., p. 6—VI).

Motions to dismiss the petition based upon a challenge of the right of the plaintiffs to institute and maintain the suit were filed by defendants and interveners and answers upon the merits were also filed by the defendants and interveners. The case was heard in the lower court upon plaintiffs' application for a temporary injunction and upon the motions to dismiss.

On oral stipulation of counsel, it was agreed that the record which would be presented upon a final hearing would be the same as that presented on the application for temporary injunction and motions to dismiss, and that, therefore, final decision could be entered upon the record as so made (R. 131).

The Court granted the motions to dismiss, and also "to make the judgment complete, the prayer of the petition for a preliminary injunction, is, after full hearing, denied, and the prayer for a permanent injunction (on a stipulation of counsel that the case on the hearing should stand submitted for final decision), is denied" 59 Fed. Rep. 2nd 760 (766) (R. 131).

2. IDENTITY OF APPELLANTS.

Appellant The Moffat Tunnel League is an unincorporated association. Its nine members are selected, three by each of the respective Boards of County Commissioners for the three counties represented by the League, the selections being made from persons designated therefor by the commercial and service clubs in the three counties. The three counties represented are Grand, Routt, and Moffat, each located in the Moffat Tunnel Improvement District (R. 88-89). All real estate within this improvement district, therefore all real

estate in the three counties mentioned above, is subject to the lien of the Moffat Tunnel bonds—the purpose of creating this district and the legality of the bonds is fully discussed in the opinion of this Court in Milheim v. Moffat Tunnel Improvement District, 262 U. S. 710 (67 Law. Ed. 1194). The County Commissioners requested this League to represent them, and the counties, in the matter of the proceedings incident to the Rio Grande's application (R. 89).

Appellant Uintah Basin Railroad League is also a voluntary unincorporated organization of the Boards of County Commissioners of Uintah and Duchesne Counties, Utah, and of the commercial and service clubs in those counties, and was organized to secure railroad facilities for those counties (R. 109). The Moffat Tunnel Improvement District does not extend into Utah (Ex. A, R. 12a). The Moffat Road, if extended west to Provo or Salt Lake City, Utah, would serve Uintah and Duchesne Counties (Ex. A, R. 12A). Appellants claim that one of the purposes of the public construction of the Moffat Tunnel was to insure the construction of the Moffat Road to Salt Lake City, and that one of the purposes of the Rio Grande in the acquisition of control of the Moffat Road is to prevent that extension.

3. THE MOFFAT ROAD AND THE MOFFAT TUNNEL.

The Moffat Road extends westerly from Utah Junction (Denver) to Craig, Colorado, 232 miles (R. 20). David Moffat, a Denver pioneer, organized the Moffat Road Company to build a railroad between Denver and Salt Lake City, and built as far as Craig and there stopped. Operations were too unprofitable, because of expensive operating conditions and light business, to encourage the building of the road westward, so in 1919 the Colorado Legislature passed a law (Chap. 195, Colo. Laws 1919, p. 669) to create a commission, with powers to acquire the Moffat Road for the State, build the Moffat Tunnel, and the Dotsero Cut-Off, and to extend the Moffat Road from Craig to the western boundary of Colorado. This law was repealed in 1921, and the next year the Colorado Legislature in special session enacted the Moffat Tunnel Law, creating the Moffat Tunnel District and the Moffat Tunnel Commission, with powers to construct the

Moffat Tunnel and to raise money for that purpose by issuing bonds of the District, which bonds are a lien against all real estate in the district (R. 122-3). The par value of these bonds is $15,470,000.00 (R. 78). The District holds title to the Tunnel and approximately ten miles of railroad line, including about six miles in the Tunnel (Ex. C, R. 20). The general balance sheet of the Moffat Road as of October 31, 1929, showed investment in Road and Equipment, $16,515,-633.88 (Ex. C, R. 21).

4. THE RIO GRANDE ROAD.

The Rio Grande extends from Denver to Salt Lake City and Ogden, Utah. From Denver it goes south 119 miles to Pueblo, thence northwesterly, crossing the Continental Divide at Tennessee Pass, at an altitude of 11,000 feet, to Salt Lake City (R. 122). The two roads are somewhat parallel at irregular distances apart, approaching within 41 miles at the point of the proposed Dotsero Cut-Off (R. 123).

5. OPPOSITION OF THE RIO GRANDE TO A WESTERN EXTENSION OF THE MOFFAT ROAD.

Julian M. Bamberger testified that in the Commission's Finance Docket 4713, The Salt Lake and Denver Railroad Company petitioned for authority to construct a line from Provo, Utah, to Craig, Colorado.

> "* * the Rio Grande not only displayed a serious and severe antagonism to our application but in many ways has endeavored to make it difficult for us to proceed with our plans" (R. 103).

The territory referred to as the Uintah Basin is approximately one hundred miles north and south and three hundred miles east and west, bounded on the north by the Uintah Mountains, on the south by the Book Cliff Range, and includes eastern Utah and western Colorado (R. 106). The only railroads in this basin are the Moffat Road, which enters the basin from the east and extends as far as Craig, Colorado, and a narrow gauge line which extends from Mack, Colorado, a point on the Rio Grande, to Watson, Utah—which road was constructed, and is used almost exclusively, for

transporting Gilsonite. Only twenty miles of this road is in Utah (R. 106).

In the brief filed by the Rio Grande in Finance Docket 4713 it was stated,

> "It is evident that the people living in the Uintah Basin, whether in or around the so called Vernal Country, or in the western Moffat County, Colorado, if the limits of the Basin be extended to include that area, would be benefited by the construction of applicant's railroad. *That they need further transportation facilities is undoubted.* That the business which they, or their sections, would contribute to this proposed railroad would justify the enormous expenditure involved, is another and far different question, which we are satisfied must be answered in the negative" (R. 109-110). (Italics ours.)
>
> "That such construction would not only greatly impair the ability of the Denver and Rio Grande Western Railroad adequately to serve the public, but would add another weak, struggling and impecunious unit to the railroad map of the Rocky Mountain section of the country, is, we believe, manifest from a candid and conservative review of the record in this case" (R. 113).
>
> "The Denver and Rio Grande Western Railroad Company realizes that its interests cannot be allowed to stand in the way of a necessary and economically sound railroad enterprise, which will not depend for its possible financial success upon the ruin of established systems of transportation, the prevention of their improvement and damage to communities and industries which have arisen along their course, and which they serve. But the record in this case, both by direct statement of applicant's witnesses, and by necessary inference from the facts, shows that applicant proposes to live upon the traffic it takes from the Denver. Without it the Bamberger line would not exist even on paper, and the application would not have been presented. Even including this traffic, a fair review of the evi-

dence and revision of the estimate respecting the cost of the projected railroad and its probable earnings must lead to the conclusion that it will not be self-sustaining, that it must fail financially, and that with such failure it will at least impair the ability of the Denver to fulfill its obligations to the public" (R. 113-4).

Witness B. H. Taylor, Vice President of the Rio Grande, testified that if the Moffat Road were extended from Craig, Colorado, to Provo, Utah, it would not be a competitor of the Rio Grande.

> "I don't think it would create any competition. I think we would be out" (R. 119).

6. THE DOTSERO CUT-OFF.

In December, 1924, the Denver and Salt Lake Western Railroad, a subsidiary of the Moffat Road, made application to the Commission, under Paragraph 18 of Section 1 of the Interstate Commerce Act, for authority to build a short line of railroad—41.3 miles—from Orestod to Dotsero, to connect the Moffat Road with the Rio Grande—this proposed short line is known as The Dotsero Cut-Off and will be hereafter referred to as the Cut-Off. Although the application was filed in 1924, the hearing on it was postponed at the request of the applicant until September, 1928, which was after the completion of the Moffat Tunnel (the first train through the Tunnel was February 14, 1928). These appellants did not participate in the hearings on the Cut-Off (Ex. 1, R. 143-4). Witness Edward C. Johnson (now Governor of the State of Colorado), then appearing as a witness for the Moffat Tunnel League, testified that the League was in favor of building the Cut-Off "if constructed by the right people" (R. 94-95). Counsel for the Rio Grande asked counsel for appellants to state the position of appellants relative to the building of the Cut-Off, in response to which appellants' counsel stated that they would be opposed to the Cut-Off if its construction would prevent the building of a western extension to the Moffat Road, but that "if the Moffat Road builds it, they will also build westward where there is tonnage" (R. 95). Witness Johnson further stated: We have no objection to the Cut-Off being

built by the Moffat Road; if the Moffat Road builds the Cut-Off then the Cut-Off does not become a competitive line with the extension west of Craig. If it is built by the applicant (the Rio Grande) the Cut-Off is immediately a competitive line with the proposed extension. I say that because if the Moffat Road owned the Cut-Off they couldn't compete with themselves. Therefore, the extension from Craig to Salt Lake would not be competitive with the Cut-Off because the Moffat Road could not compete with itself (R. 97).

April 15, 1929, the Commission entered its first opinion on the Application of the Moffat Road for authority to build the Cut-Off, in which it said, "Any proposal which would tend to produce an injurious effect upon the interests of that property" (the property of the Rio Grande) "should be considered very carefully" (Ex. 1, R. 147). The Commission then found that public convenience and necessity required the construction of the Cut-Off "upon condition that the Rio Grande be permitted to operate over said line" (the Cut-Off) "*and over the Moffat Road* between Orestod and Utah Junction, Colorado, on fair and reasonable terms to be approved by us" (Ex. 1, R. 149). (Emphasis ours.) *In less than one year from the date of this order, to-wit, February 1, 1930,* the Rio Grande was able to advise the Commission that "an opportunity was afforded to purchase" 21,334 shares of the Moffat Road (out of a total of 50,000 shares) and to make an agreement for the purchase of 7,635 additional shares, or a total of 28,969 shares, 57.9% of the total stock (Ex. C, R. 20).

7. MILEAGES BETWEEN MATERIAL POINTS.

The distances between Denver and Salt Lake City are as follows:

Via the Rio Grande	745	miles
" " Moffat Road—the Cut-Off and the Rio Grande	*572	"
" " Moffat Road and the proposed extension beyond Craig	575	"

*(This route also is more favorable as to grades than the route via the Rio Grande).

Via the Union Pacific	614 miles

Other distances which may be of interest to the Court:

Denver to East Portal of the Moffat Tunnel	50 miles
" " Orestod	129 "
" " Dotsero via the Moffat Road	170 "
" " " " " Rio Grande	343 "
" " Craig via the Moffat Road	234 "
Craig to Provo, Utah, via proposed Moffat road extension	297 "

8. MOFFAT ROAD INCOME BEFORE AND AFTER TUNNEL OPERATION.

In 1927, the last year of operation of the Moffat Road before the Tunnel was completed, the Moffat Road's net income was a deficit of $131,875.00, and in 1929, the net income (after paying the tunnel rentals) was a surplus of $610,068.00 (R. 153).

9. TUNNEL BOND ASSESSMENT AGAINST THE DISTRICT.

The Moffat Tunnel Commission levied two assessments of $516,000.00 each against the real estate in the District, one in each of the years 1928-1929 (Ex. C, R. 23); the tunnel rentals paid by the Moffat Road will equal only forty-nine to fifty per cent of the interest and principal of the Tunnel Bonds (Ex. C, R. 23, R. 79). The basis for the assessments is the value of each piece of real estate, using the County Assessor's valuations. If the values are changed by the Assessor from year to year the assessment for the tunnel bonds would correspondingly change (R. 80). No part of the Rio Grande road is within the Tunnel District except its lines within the City and County of Denver (R. 80).

Moffat County has an area of 3,000,000 acres, and the Moffat Road extends only seven miles into the County, but the entire County is subject to the lien of the Tunnel Bonds (R. 91). The Commission's Examiner would not permit the witness to testify as to the distance from Craig to the western boundary of the County (R. 91).

10. NATURE OF TESTIMONY EXCLUDED.

(1) That the construction of the Moffat Road has from the beginning included a plan under frequent public and railroad discussion for a western extension of the Moffat Road from Craig; that the construction of the Moffat Tunnel was in aid of this project as well as the Denver-Craig traffic and the Dotsero Cut-Off (R. 81).

(2) That in the assessment of benefits in the Moffat Tunnel District there was from the beginning included in such benefits the likelihood of a connection west from Craig, and that benefits were assessed by the Tunnel Commission on the basis of evidence of benefits which would result to the lands in the Moffat Tunnel Improvement District from railroads operating through the Tunnel over the three routes, namely, the Dotsero Cut-Off, the Denver-Craig line, and Denver to Utah via a western extension of the Moffat Road (R. 81).

(3) That the organization of the Moffat Tunnel District and the construction of the Moffat Tunnel were based on a long series of public activities and public campaigns, and as a means of facilitating successful operation of the Moffat Road not only as a local road but also as a through route which it was expected would be made with Utah common points and other points west of Craig by an extension of the Moffat Road (R. 81-100).

(4) That the construction of the Moffat Tunnel has been a matter of public importance to the State of Colorado since 1912; that during that time several projects were put forward and votes taken, both by the Legislature and the people, and that in each instance the people in the territory included in the Moffat Tunnel District voted for the construction, and the people in the territory which would be benefited by the acquiring of the Moffat Road by the Rio Grande consistently voted against it (R. 92).

(5) That the public interest, convenience and necessity require the construction of an extension from Craig; that from the time construction of the Moffat Road com-

menced, and throughout the period since such commencement, the public has been asked to assist it in one way or another, including the passage of the Tunnel Act, it was consistently held out that the purpose was to construct the road westward, and that the public would not have agreed to tax themselves if that hope had not been held out (R. 93-94).

(6) The available resources of the Uintah Basin, including Duchesne, Uintah, Grand, Routt, and Moffat Counties, for the purpose of showing the public interest in having a railroad construction west from Craig to either Provo or Salt Lake City (R. 111-116, 93).

(7) That many hundreds of settlers were induced to go into the Uintah Basin by reason of prospects held out to them by the Moffat Road, Government agents and commercial bodies, of the imminent probability of the extension of the Moffat Road through the Basin; that they have since left and stated as their reason the present lack of railroad facilities (R. 111-2).

(8) That the Moffat Road conducted a long campaign of colonization, and held out to the public and possible settlers, that its purpose and intent were to extend the line to either Provo or Salt Lake City, and that witness Paul, under instructions of the Vice President of the road, published half-page advertisements, holding out that inducement (R. 112).

(9) That the Unted States Government, by posters in post-offices and other public buildings, held out similar inducements to the public to colonize this section by advising them of the probability of the extension of the railroad (R. 112-3).

(10) All evidence, except that of the Rio Grande, relative to the construction of the Dotsero Cut-off, the public interest therein, and the financing thereof (R. 62-63, 74, 101).

(11) Evidence that the control of the Moffat Road by the Rio Grande would enable the latter to divert traffic

from the former and thereby financially wreck the former (R. 91-2).

(12) Evidence that the coal, which constitutes one of the principal items of traffic of the Moffat Road, is competitive with the coal which constitutes an important item of traffic of the Rio Grande, and that if the Rio Grande is permitted to obtain control of the Moffat Road it could use such control to destroy the Moffat Road's coal traffic for the benefit of the Rio Grande coal traffic (R. 90).

(13) Evidence that the Rio Grande has at all times been opposed to the extension of the Moffat Road westward beyond Craig (R. 100).

11. COMMISSION'S FINDINGS AS TO PUBLIC INTERESTS.

The Commission found that the granting of the Rio Grande's application was in the public interest for the following reasons:

A. Because it accords with the Commission's general plan of consolidation (Ex. C, R. 33).

B. It tends toward simplification of the construction and operation of the Cut-off (Ex. C, R. 33).

12. DISSENTING OPINION.

Commissioner Eastman filed a dissenting opinion because

> "In my judgment, it has not been shown that acquisition of control * * * is in the public interest" (Ex. C, R. 34).

C. ASSIGNMENTS OF ERROR URGED.

Appellants urge the following Assignments of Error:

That the District Court erred in determining and decreeing as follows:

A. That the plaintiffs cannot maintain this suit because they are voluntary unincorporated associations (Assignments Nos. 1 and 3).

B. That the plaintiffs cannot institute this suit because they do not have a legal interest in the Commission's order and cannot sustain a legal injury by reason of it (Assignment No. 2).

C. That the Commission did not improperly exclude evidence offered by the plaintiffs (Assignment No. 4).

D. That some of the evidence excluded by the Commission was offered by parties other than plaintiffs, and that even if such exclusion was improper plaintiffs cannot complain because that evidence was offered by parties other than the plaintiffs (Assignment No. 5).

Assignments 6 to 9, inclusive, are necessarily determined by the decision upon Assignments 1 to 5.

D. ARGUMENT.

For convenience of the Court, we have inserted as an appendix to this brief, a map showing the Moffat Road, the Moffat Tunnel, the proposed Western Extension, The Moffat Tunnel Improvement District, the counties mentioned in the "Statement of the Case," the Dotsero Cut-Off, and the Rio Grande road. This map is substantially a reprint of Exhibit A (R. 12 A) with some of the unnecessary details eliminated and slightly enlarged.

The case presented may be summarized thus:

The Rio Grande applied to the Commission for authority under Paragraph 2 of Sec. 5 of the Interstate Commerce Act (U. S. C. A., Tit. 49, Sec. 5, Par. 2) for authority to acquire control of the Moffat Road. The Moffat Road was designed to extend from Denver to Salt Lake City, over a route 575 miles long. So far the road has been constructed only to Craig, 234 miles, 43 per cent of the total distance, but in that 234 miles is included the tunnel through the Continental Divide (the Moffat Tunnel). The Rio Grande extends from Denver to Salt Lake City over a route 745 miles long and crossing the Continental Divide at an elevation of 11,000 feet. The Moffat Road extended to Salt Lake City would constitute a substantially parallel line to the Rio Grande, the two

roads meeting at Denver and at Salt Lake City (and probably at Provo, Utah), approaching each other within 42 miles at the points where it is proposed to build the Cut-Off as a connecting link between the two lines.

There is this very exceptional feature in this case, that whilst the Moffat Road balance sheet as of 1929 shows an investment of $16,515,633.88 in Road and Equipment, the Moffat Tunnel District has issued $15,470,000 in Tunnel Bonds, so that the public investment in the properties involved in the Rio Grande application is substantially equal to the railroad's investment, and the public investment is evidenced by bonds which necessitate a continuing charge for interest against the real estate in the District.

These appellants represent three counties in the District and also two counties in Utah, which would be traversed by the Moffat Road if it were extended to Salt Lake or to Provo, Utah, and which two counties are now without railroad facilities.

Before the Commission has authority to grant the Rio Grande's application, it must determine "after hearing"

> "that the acquisition * * * by one of such carriers of the control of any other such carrier * * * by the purchase of stock * * * will be in the public interest"—U. S. C. A., Tit. 49, Sec. 5, Par. 2.

The questions here presented are:

I. Was the hearing held by the Commission a sufficient compliance with the statutory requirement of a "hearing" in view of the testimony excluded by the Examiner?

II. Can these appellants maintain a suit to question the sufficiency of that hearing?

These questions will be discussed under the following headings:

A. Parties having the necessary interest in the subject matter are not debarred from instituting and maintaining a suit to set aside an order of the Commis-

sion merely because they are unincorporated associations.

B. The interest of the appellants in the subject matter of the proceeding before the Commission is sufficient to enable them to maintain this suit to set aside the order of the Commission.

C. That the hearing held by the Commission was insufficient to constitute a compliance with the statute because of the exclusion of material testimony and refusal to consider matters material to a determination of the public interest.

D. That if material evidence was excluded when offered by other interests, appellants were not required to reoffer the same evidence in order to complain of its rejection.

A.

PARTIES HAVING THE NECESSARY INTEREST IN THE SUBJECT MATTER ARE NOT DEBARRED FROM INSTITUTING AND MAINTAINING A SUIT TO SET ASIDE AN ORDER OF THE COMMISSION MERELY BECAUSE THEY ARE UNINCORPORATED ASSOCIATIONS.

The opinion of the lower court states,

> "Unless the statute gives interveners, as such, a right to institute independent suits to enjoin the action of the Commission (and we find none), their right so to institute suits remains as at general law, which is, first, that voluntary, unincorporated associations of persons do not have a legal capacity to sue" (R. 127).

Section 45a, Tit. 28, U. S. C. A., relating to procedure in suits to enjoin orders of the Commission, provides that

> "any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, *may appear as parties thereto of their own motion and as of right*, and be represented by counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party."

Later in the same section is a provision as to who may intervene in such suits "at any time after the institution thereof." It follows, therefore, that the provision just quoted does not relate to an intervention but must refer to original parties.

Construing this section this Court in Baltimore & Ohio R. Co. v. United States, 264 U. S. 258 (68 Law Ed. 667), said this section—

> "declares that any party to a proceedng before the Commission may, as of right, become a party to 'any suit wherein is involved the validity of such order.' The *section does not in terms provide that such party may institute a suit to challenge the order. But this is implied.* For, otherwise, there would in some cases be no redress for the injury inflicted by an illegal order. Moreover, the fact of intervention allowed as it was, implies a finding by the Commission that the plaintiffs have an interest" (Pages 267-8).

Continuing, this Court said:

> "No case has been found in which either this court, or any lower court, has denied to one who was a party to the proceedings before the Commission the right to challenge the order entered therein. On the other hand, persons who were entitled to become parties before the Commission, but did not do so, have been allowed to maintain such suits where the requisite interest was shown. Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 49; (56 Law Ed. 83, 88); 32 Sup. Ct. Rep. 22; Skinner & E. Corp. v. United States, 249 U. S. 557, 562, 63 L. Ed. 772, 776, 39 Sup. Ct. Rep. 275" (268-269)

The above quoted language has a very direct application to this case. Here on the one hand is the Ro Grande anxious to stifle the threatened competition of the Moffat Road; on the other hand there is the Moffat Road with fifty-four per cent of its stock sold to the Rio Grande for $155.00 per share, and the Commission's order requires the Rio Grande

to purchase the minority stock at the same price, if it is offered. Obviously the Moffat Road is not objecting to being swallowed up on such terms. In this connection it should be noted that the Moffat Road was not named originally as a party to the proceeding before the Commission, did not appear at the hearings, and only intervened when the Rio Grande sought to postpone the effective date of the Commission's orders (180 I. C. C. 715). Since neither railroad is interested in representing the patrons of the Moffat Road, the real parties in interest, they necessarily must organize and represent themselves.

Returning to the language of the statute quoted above, it refers to any party or parties in interest before the Commission. Prior to the enactment of this section, 45a, Section 13 of the Interstate Commerce Act (U. S. C. A., Tit. 49, Section 13) provided that

> "any person, firm, corporation, company, association, or any mercantile, agricultural or manufacturing society or other organization"

could be a party before the Commission. This provision has always been construed by the Commission as permitting voluntary unincorporated associations to become "parties" to any proceeding before the Commission (see Interstate Commerce Acts Annot., pages 1746-7, Note 33).

In McLean Lumber Co. v. U. S., 237 Fed. 460 (Tennessee 3 Judge Court), the court after citing the statutory provision here under discussion, said:

> "Construing the foregoing provisions of the Commerce Court Act in their entirety, we are of the opinion it was intended that any person who had acquired a standing as a party in interest in proceedings before the Commission *should have the right to appear as a party in any suit brought in the court involving the validity of an order therein made by the Commission, as distinguished from the mere right of intervention given to other persons who were not parties in interest before the Commission, but merely 'inter-*

> *ested in the controversy in question,' and that the right thus given to a party in interest before the Commission is not limited to his appearance as an intervener in such proceedings as may be instituted by other parties in interest before the Commission, but includes the right to appear in the court as a party plaintiff in proceedings which he himself may bring to test the validity of the order of the Commission*" 467-8).

In that same case the court directs attention to Merchants Association v. U. S., 231 Fed. 292 at 294, where it was held

> "that traffic associations, formed for the purpose of representing merchants in traffic matters, were entitled to bring a petition in equity to enjoin the enforcement of orders of the Commission"

even though the Commission specifically objected that such association, not being itself a shipper, had no interest in the order.

In the case of Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42 (56 Law. Ed. 83), in the trial court *the Transportation Committee of the Board of Trade of Kansas City*, the Omaha Grain Exchange and certain individuals, representing the Atchison Board of Trade, filed their bill alleging that the enforcement of the Commission's order

> "would depreciate the value of their elevators, and their investments in these and other facilities for the transfer, purchase, and sale of grain in their cities by depriving them of compensation for its transfer, would draw away from their cities to eastern, northern and southern marts a large volume of their grain business, and would tend to diminish the grain markets in their cities to their irreparable injury." Diffenbaugh v. Interstate Com., 176 Fed. 409 (415-6).

The lower court said:

> "'The Interstate Commerce Act authorized incorporated boards of trade of cities and *associations of like character* to apply to the Commission for relief, and such corporations and members representing such associations may likewise apply to the courts for relief from injuries unlawfully afflicted by the Commission" (415).

This Court, reviewing that case, said:

> "The jurisdiction in the Diffenbaugh case was doubted, although the Commission did not press the point, as it wishes a final decision. We are content to leave that matter on the statement of the court below, 176 Fed. 416-7. The plaintiffs are affected by the order, and it is just that they should have a chance to be heard, although not parties before the Commission" (49).

In Village of Hubbard, Ohio, v. U. S., *et al.*, 278 Fed. 754, Dist. Ct. E. D., 3 Judge Court, Op. by Dist. J. Westenhaver, it was said:

> "The first proposition to be considered is whether defendants' objection is sound, that the plaintiff is without interest in the controversy and has no standing. * * * The village of Hubbard was served by the Interstate Commerce Commission with a copy of its order of investigation, appeared and was heard. * * * *It has long been the practice to permit representative associations and exchanges to institute and maintain proceedings before the Commission and to be heard in court against its orders.*"

The further provisions of Section 45a also clearly indicate that Congress intended that unincorporated associations, having the necessary interest in the subject matter, can prosecute a suit to enjoin the Commission's orders. The provision relative to who may intervene in such suit specifically includes "communities and associations," and then provides that such interveners, which includes communities and

associations, can, in case of non-action of the attorney general, "prosecute, defend or continue such suit." Certainly if an unincorporated association which comes into such a suit by way of intervention is competent to prosecute and continue such suit, it is illogical to say that Congress intended that a similar unincorporated association is incompetent—merely because it is unincorporated—to institute the suit.

In the light of the foregoing statutory provisions, and the decisions, it must be assumed that Congress was well advised that unincorporated associations are frequently parties in interest to proceedings before the Commission, and that when it provided unqualifiedly that

> "any party or parties in interest to the proceedings before the Commission"

may appear as of right in suits to set aside orders of the Commission, it intended to include all organizations and individuals which could be parties in interest before the Commission. Therefore, we submit, the lower court erred in holding that these appellants could not maintain this suit because they were unincorporated organizations.

B.

THE INTEREST OF THE APPELLANTS IN THE SUBJECT MATTER OF THE PROCEEDING BEFORE THE COMMISSION IS SUFFICIENT TO ENABLE THEM TO MAINTAIN THIS SUIT TO SET ASIDE THE ORDER OF THE COMMISSION.

The second point decided by the District Court was that the plaintiffs (appellants)

> "If otherwise capable to sue, they must have a legal right arising from a legal interest, the denial of which inflicts or threatens a legal wrong" (R. 127),

and the court held that these appellants have no such interest in this case.

In support of this finding the court cites, among other cases, Pennsylvania Railroad Co. v. United States, 40 Fed. (2nd) 921, Indian Valley R. R. Co. v. United States, 52 Fed. (2nd) 485.

In each of those cases the basis of the respective plaintiffs' complaints was that theretofore they had exclusively enjoyed traffic which was affected by the Commission's order; that, as they alleged, the Interstate Commerce Commission by an illegal order had created competition for that traffic, and that by reason thereof they were injured. In each case the trial court held that the Commission's order did not subject them to any injury of which they could complain; the substance of the decision in each case may be illustrated by a short quotation from the Pennsylvania case:

> "True, the complainant now is and for a long time has been exclusively serving Donora and is now receiving the profits from handling all the traffic flowing in and out of that busy district. But that is a privilege rather than a right—a privilege to be enjoyed so long as it shall last, not a right to be asserted, unless it be found somewhere in the law, written or unwritten. Certainly there is no unwritten law that gives a carrier, first to serve a community, the right to hold its traffic against all competitors" (925).

This holding, we submit, is contrary to the later decisions of this Court.

In Claiborne-Annapolis Ferry Co. v. United States, 285 U. S. 382 (76 Law. Ed. 808), the Ferry Co. complained of an order of the Interstate Commerce Commission permitting the Chesapeake Beach Ry. Co. to operate a ferry for the transportation of passengers and property across Chesapeake Bay. The complaint of the Ferry Co. was that the order would permit the Railway Company to compete with the Ferry Company unless the order was redrawn so as to restrict the ferry operations of the railway company. The Interstate Commerce Commission appeared in that case before this court and contended that the Commission's order did not invade any legal right of the Ferry Company, and in that connection cited Pennsylvania Railroad Co. v. United States, 40 Fed. (2nd) 921, *supra*. In answering that contention this Court said:

> "The bill disclosed that the proposed and permitted action might directly and adversely affect its (the Ferry Company's) welfare by changing the transportation situation."

Therefore the Court held that the Ferry Company was a party in interest capable of instituting the injunction suit. In Western Pac. C. R. Co. v. Southern Pac., 284 U. S. 47 (76 Law. Ed. 160), the Western Pac. C. R. Co. applied to the Interstate Commerce Commission for authority to construct a proposed road. The Southern Pacific appeared in opposition to the application. The Southern Pacific also commenced to lay tracks of its own for the purpose of impeding and preventing the Western Pacific's proposed construction, and to secure traffic which the Western Pacific's proposed extension would have secured to it. The Western Pacific instituted suit to enjoin the Southern Pacific from proceeding with the extension until it had secured authority from the Interstate Commerce Commission to make such extension. The question was raised whether the Western Pacific could be considered as "a party in interest" authorized to maintain such an injunction suit. This Court said:

> "It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened, *or that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation.* The disclosures of the bill were enough to show that the respondent's intended action might directly and seriously affect the project which complainant was undertaking in good faith. There was enough to give the latter the standing of a 'party in interest' within the intendment of the Act."

We particularly direct attention to the language above quoted, that complainant's interest is sufficient if it shows an invasion of "some definite legal right," or "that the unauthorized * * action * * may directly and adversely affect

the complainant's welfare by bringing about some material change in the transportation situation." In support of the decision in the Western Pacific case, *supra*, this Court referred to its decision in Texas and P. R. Co. v. Gulf C. & S. F. R. Co., 270 U. S. 266 (70 Law. Ed. 578), and in that respect said:

> "The Texas and Pacific Railway sought to prevent an unauthorized competitor from building an extension into territory already served by it. Prior to the statute, it could not have maintained such a suit, since the competitor's proposed action did not threaten interference with any legal right. No carrier could then demand exemption from honest competition. If, as the court below seemed to have assumed, a 'party in interest,' must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the congressional plan for promoting transportation. On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding. The complainant must possess something more than a common concern for obedience to law."

The decision in the Claiborne and Western Pacific cases, *supra*, clearly show that the decisions in the Pennsylvania Railroad Company case, *supra*, and the Indian Valley Railroad Company case, *supra*—relied upon as authority by the lower court in this case—are in conflict with the construction which this Court has placed upon the meaning of the term "party in interest" in the statute here under consideration. We may take it, then, that the established construction of Section 45a of Title 28, U. S. C. A., is that if by an unlawful act a carrier is proposing, "by changing the transportation situation," to adversely affect the interest of one who was a party to the proceedings before the Interstate Commerce Commission, such party may institute a suit such as the one at bar. It is therefore contended by these appellants that the lower court in this case erred in construing the rights granted by said Section 45a too narrowly.

We will next discuss whether appellants have brought themselves within the broad construction given to Section 45a by this Court. In Baltimore & Ohio R. R. Co. v. United States, *supra*, this Court said:

> "Moreover, the fact of intervention, allowed as it was, implies a finding by the Commission that the plaintiffs have an interest. In the proceeding before the Commission, they opposed by evidence and argument the grant of this application. This they did as of right. For under the rules of practice, adopted by the Commission pursuant to Par. 1 of Sec. 17 of the Interstate Commerce Act, the intervener becomes a party to the proceeding, entitled, like any other party, to appear at the taking of testimony, to produce and cross-examine witnesses, and to be heard in person or by counsel. The intervention must be preceded by an order of the Commission granting leave, and leave can be granted only to one showing interest."

The fact, therefore, that in this case these appellants were permitted to intervene before the Commission and, as the record shows, introduced testimony, cross-examined witnesses, and throughout actively opposed the granting of the application, creates a prima facie case that these appellants are "parties in interest" within the provisions of Sec. 45a.

For the purpose of determining the interest of appellants in the application, the testimony which was offered and which was excluded at the hearing is obviously pertinent. These appellants represent the property owners and business interests of three counties in western Colorado and two counties in eastern Utah. All of the real estate in the three counties in Colorado has been subjected to the lien of the Moffat Tunnel Bonds. All of these three counties lie beyond Orestod, where the Cut-Off will begin, so that if the application is granted, instead of being on the main line of a local Colorado road these counties will be served only by a stub branch of the Rio Grande, which in turn is controlled by the Missouri Pacific and the Western Pacific roads, foreign roads having no interest in Northwestern Colorado. Testimony was offered

to show that the Rio Grande was opposed to the construction of any western extension of the Moffat Road beyond Craig; that in determining the benefits which would result to lands in Western Colorado from the construction of the Moffat Tunnel, the Tunnel Commission took into account the increase in value of such lands which would result from such an extension of the Moffat Road, which extension, it was assumed, would result from the Tunnel construction; that such extension would result in increase of value to lands in the western part of Moffat County, which in turn would result in a decrease of the assessments in Grand and Routt Counties; that one of the principal items of traffic of the Moffat Road is coal and that the Rio Grande would naturally be interested in developing the coal traffic on its own lines in Utah instead of the Moffat Road traffic; that the Rio Grande could divert a considerable amount of other traffic from the Moffat Road to the Rio Grande; that the communities represented by appellants were entirely dependent upon the Moffat Road and its development for railroad facilities, and that the granting of the application would frustrate that development and leave this portion of the Moffat Road a mere branch line controlled by a railroad interested in diverting traffic to a competing line. All of this would not only change the transportation situation but would adversely affect the value of lands in the counties represented by appellants and as to lands in the counties of Colorado so represented, would defeat the very purpose for which the owners consented that their lands become subject to the lien of the Tunnel Bonds.*

The interest of these appellants is therefore not only their interest as communities dependent upon the Moffat Road for railroad facilities, but also in the case of the Moffat Tunnel League, the interest as representatives of owners of property within the Moffat Tunnel Improvement District which is being assessed to pay for the Tunnel, which Tunnel is directly involved in this proceeding.

It may be suggested that it is the function of the Moffat

*Section 3 of the Moffat Tunnel Act provided for the defeat of the measure and the project upon remonstrance of fifty per cent in value of the lands in the District.

Tunnel Commission to represent the property owners of the Moffat Tunnel Improvement District. In that connection it is pertinent to notice the changes which have been made in the Moffat Tunnel Act since 1922. Section 4 of Chapter 2 of the Session Laws of Colorado (Special Session), 1922, provided for the management of the District by a board of five members to be known as the Moffat Tunnel Commission. The first Board was to be appointed by the Governor to hold office until August 31, 1923; future commissioners were to be elected, and for that purpose the District was divided into two divisions, Division 1, the portion lying east of the Continental Divide, and Division 2, the portion lying west of the Divide. In 1927 the Legislature enacted Chapter 131 of the Colorado Laws of 1927, which provided that the Governor should thereafter appoint the members of the Moffat Tunnel Commission, and that three of the members must be appointed from Division 1 and two from Division 2. In 1931, by Chapter 116 of the Session Laws of Colorado (which was enacted after the decision of the Commission in this case), the right to elect the commissioners was restored to the electors of the two divisions of the District, and the Governor's power to appoint members was taken away, except in the case of vacancy—the Governor can appoint a member to fill such vacancy for the unexpired term only. This legislative history is significant, first, because it has been recognized right along that the District should be divided into two divisions, the one east and the other west of the Continental Divide, and second, that after experimenting with commissioners appointed by the Governor, the Legislature found it necessary to restore to the electors of the Tunnel District the direct control over the membership of the Commission. The interests of communities west of the Divide will not always coincide with those of the communities east of the Divide, therefore the Legislature provided for dividing the district into the two divisions.

The statute under which the Rio Grande made its application provides that the Commission shall grant authority to one railroad to acquire control of another railroad by stock purchase, only when, "after hearing", the Commission deter-

mines that such acquisition is in the public interest. Under the statute, therefore, the Commission could not make any lawful order in the premises until it held such a hearing. Assuming appellants are correct in their contentions concerning the insufficiency of the hearing which the Commission held, then, if they are adversely affected by such order, they have been deprived of their legal rights by the order here under attack.

We submit, therefore, that the record discloses an interest on the part of these appellants which establishes that they are "parties in interest" within the meaning of Section 45a aforesaid, and entitled to maintain this action.

Two decisions by this Court are cited by the lower court in support of its ruling; Sprunt and Son, *et al.*, v. United states, *et al.*, 281 U. S. 249 (74 Law. Ed. 832), and Pittsburg & W. V. R. Co. v. United States, *et al.*, 281 U. S. 479 (74 Law. Ed. 980).

In the Sprunt case the Commission on its own motion conducted a general investigation into complaints that cotton shippers located along the water front were being unlawfully favored by the carriers and that shippers located uptown were being unlawfully discriminated against. The Commission found the discrimination existed, and entered an order requiring the discrimination to be removed. Separate suits were filed to enjoin the Commission's orders, one by some of the carriers, one by the shippers who had been the recipients of the advantages condemned by the Commission. The carriers discontinued their litigation, and complied with the Commission's orders, the shippers attempted to continue their suit. This Court held they could not do this, because (a) since the carriers had established the rates a judgment setting aside the Commission's order would be futile because the carriers still would be free to maintain the new rates; (b) the shippers had not been deprived of any right, since they were merely entitled to reasonable rates, and if such rates were accorded to them they could not complain of the loss of a competitive advantage to which they were not otherwise entitled; (c) if the rates resulting from the Commission's order were unreasonable, that question had been ex-

pressly left open by the Commission, so that the shippers' remedy was in that event by a proceeding before the Commission and not by a suit in court.

In the Pittsburg W. V. R. Co. case, the Pittsburg road's interest in the Commission's order was as a stockholder in the Wheeling,

> "and there is no suggestion that the order can affect it as a carrier" (487).

The attack upon the order was not based upon carrier considerations or upon the question that the Commission had not decided according to public interest, but solely as to the effect of the Commission's order upon the interest of a stockholder in the Wheeling Road. This Court specifically pointed out that the case—even as to an investor's interest—was unlike orders

> "in some cases of acquisition of control of one carrier by another" (487).

We submit that in neither of these two cases is there any analogy to the case at bar, and therefore they are not even persuasive in this case.

C.

THAT THE HEARING HELD BY THE COMMISSION WAS INSUFFICIENT TO CONSTITUTE A COMPLIANCE WITH THE STATUTE BECAUSE OF THE EXCLUSION OF MATERIAL TESTIMONY AND REFUSAL TO CONSIDER MATTERS MATERIAL TO A DETERMINATION OF THE PUBLIC INTEREST.

A short review of the historic background of the Colorado railroad situation as shown by the previous decisions of the Commission and of this Court may throw light upon the situation here involved.

The importance of the Moffat Road to Northwestern Colorado was thus stated by the Commission:

> "The continued operation and proper maintenance of the transportation services of the Moffat Road are of vital importance to Grand, Routt, Moffat, and Eagle Counties, having an estimated population of 26,000,

served exclusively by it, and are also of importance to the City of Denver and to the Federal Government. The investment in coal-mining properties in the Oak Hills District, an area of about 1,200 square miles, is estimated at from seven to ten million dollars. The production of coal has averaged a million tons per year for the last six years. On account of the good storing qualities of the coal it finds a ready market in Kansas and Nebraska as well as in Colorado. In this region west of the Continental Divide there are about 600,000 acres of Government land, 400,000 of which are underlaid with workable veins of coal, and some with copper ore. This region contains a stand of more than a billion feet of merchantable timber and produces 15 per cent of the cattle grown in Colorado. *We have no question that there is public necessity for the continued operation of the Moffat Road.*" Freeman and Boettcher v. A. T. & S. F. Ry., 73 I. C. C. 178 at 183.

Discussing the purposes which justified the Legislature in enacting the Moffat Tunnel Law, this Court said:

"They (the objectors to the Tunnel Bill), however, contend that the tunnel must be deemed for a private, rather than a public purpose, because it is located so as to be practically a part of the line of the Moffat Road, and is intended for its use, *the real object of the act being,* as expressed by the governor, *ta save this railroad to the people of the State. There is virtually no denial of this; and evidently this was the motive which led to the passage of the act, and is the primary purpose for which the tunnel is to be constructed.* This, however, is not a private purpose. The use of the tunnel by the Moffat Road will be for a beneficial public purpose. This railroad runs from Denver, on the east of the Continental Divide, to Routt County in the northwestern corner of the state, a distance of 255 miles. It crosses the divide by a circuitous route above this tunnel, with steep grades and heavy curves. In the winter seasons this portion of its line is almost

impassable. Its operations result in heavy losses, and it is now in an embarrassed financial condition and unable to build the tunnel. Without the use of the tunnel, the railroad must, it seems, be abandoned; and this avenue of communication between different portions of the state will be lost. The use of the tunnel will reduce the elevation, grades, and curvature of the railroad, shorten its line about 23 miles, and save it large amounts annually. *Evidently the preservation of this railroad, a common carrier of persons and property, as a means of communication between the eastern and northwestern portions of the state, is a matter of great public importance; and a tunnel enabling it to provide quicker and cheaper transportation during all seasons of the year will greatly promote the public welfare.*" Milheim v. The Moffat Tunnel District, 262 U. S. 710 (718-719) (67 Law. Ed. 1194).

These decisions show the public importance of the Moffat Road, particularly to the public in the counties represented by the Moffat Tunnel League.

The evidence in this case shows that the control of the Rio Grande is held one-half by the Missouri Pacific and one-half by the Western Pacific interests. In that situation the following excerpts from the opinion of the Commission in an investigation instituted on its own motion in 1921, into the history of the Rio Grande (the opinion was handed down July 6, 1926) are pertinent. The title of the proceeding was: Denver and Rio Grande Investigation—*In Re* Accounts, Financial Operations, and Practices of Western Pacific Railway Company, Denver & Rio Grande Railroad Company, Western Pacific Railroad Company, and Denver & Rio Grande Western Railroad Company. 113 I. C C. 75.

"The significant feature of these disclosures were that development of the territory served by the New Denver's* existing lines had been retarded by the character of the service rendered and the high rates

*The Commission designated the Rio Grande as "New Denver" to distinguish it from its predecessor, which was designated the "Old Denver".

charged, and that, if a considerably smaller sum than that advanced to the Western Pacific had been expended in modernizing the New Denver's own service, rapid increases in traffic and earnings would almost certainly have resulted therefrom" (110).

"A majority of the Old Denver directors were likewise directors of the Missouri Pacific and the record leaves no doubt that their judgment as to the interests of the Old Denver and its subsidiary, the Western Company, was influenced by their concern as to the welfare of the Gould System, considered as a whole. * * * * It is reasonably certain that if one-half of the money advanced to the Western Pacific by the New Denver, had been expended in properly maintaining and improving its own service, the resulting benefits would have greatly exceeded any possible benefits which it might have derived from providing the Gould roads with their Pacific coast connection. * * * *In brief, shortly after the Missouri Pacific control had been established over them, the Denver companies, theretofore profitably and conservatively managed, were committed to an unwise speculation which was intended to benefit all railroads of the Gould System, whereas its risks would be borne by the Denver companies alone*" (157).

"*That commitment caused the diversion to the support of another railroad of many millions of dollars which normally would have been used for the improvement of the New Denver's own service and for the maintenance of a sound financial position. Deprived of an efficient and modern railroad service, the agricultural and industrial growth of the country tributary to the New Denver lines was retarded and entire communities were thereby subjected to heavy losses.* Finally the obligations under that commitment brought about the New Denver's insolvency and the resulting enormous losses to its security holders" (159).

These decisions present the picture which confronted the appellants when the Rio Grande made its application to be

allowed to purchase control of the Moffat Road, which included the lease on the Moffat Tunnel.

It now becomes important to consider what investigation the Commission should have made in order to decide whether granting the Rio Grande application was in the public interest.

In Baltimore & O. R. Co. v. United States, *supra*, this Court, having under consideration this same Paragraph 2 of Section 5 of the Interstate Commerce Act, stated:

> "Upon application of a carrier, the Commission must form a judgment whether the acquisition proposed will be in the public interest. It may form this judgment only after hearing. *The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it.* To refuse to consider evidence introduced, or to make an essential finding without supporting evidence, is arbitrary action" (265).

In Colorado v. United States, 271 U. S. 153 (70 Law. Ed. 878), the carrier had petitioned for a certificate that "present and future public convenience and necessity permitted the abandonment" by it of a certain branch line. In deciding what factors the Commission should consider on an application of that character, this Court says:

> "The sole test prescribed is that abandonment be consistent with public necessity and convenience. In determining whether it is, the Commission must have regard to the needs of both intrastate and interstate commerce. For it was a purpose of Transportation Act 1920, to establish and maintain adequate service for both. (Citing authorities.) The benefit to one of the abandonment must be weighed against the inconvenience and loss to which the other will thereby be subjected. *Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce.* (Citing authorities.) The result of this weighing—the judgment of the Commission—is ex-

pressed by its order granting or denying the certificate" (168).

"*In some cases, although the volume of the whole traffic is small, the question is whether abandonment may justly be permitted, in view of the fact that it would subject the communities directly affected to serious injury while continued operation would impose a relatively light burden upon a prosperous carrier.* The problem and the process are substantially the same in these cases as where the conflict is between the needs of intrastate and of interstate commerce. *Whatever the precise nature of these conflicting needs, the determination is made upon a balancing of the respective interests—the effort being to decide what fairness to all concerned demands*" (168-169).

The case of Transit Commission v. United States, 284 U. S. 360 (76 Law. Ed. 342), also involved a proposed abandonment, and the question was as to public convenience and necessity. In that case this Court said:

"*In reaching these conclusions the Commission considered the needs of the communities served, and gave due regard to them.* It was shown that the city authorities had refused to take over the line, when the company offered to convey it, on the ground that the territory could be adequately served by bus transportation. Moreover, the company could not maintain satisfactory schedules on the branch, because of congestion in the tunnels under the East River, and without better schedules could not hope to increase use of this line. It was in evidence that the company's offer to establish an adequate bus system had not been accepted by the city authorities. There was other proof, which need not be detailed, as to the intrastate traffic needs. All these matters were given due consideration by the Commission in reaching its ultimate conclusion. It followed the course outlined in Colorado v. United States, *supra*, and the claim that its action was beyond its authority and without warrant of law cannot be sustained" (368).

At the end of the opinion in that case this Court further said:

> *"The evidence was ample to give a comprehensive view of the entire situation, and due weight was accorded all of the proofs in the light of the conflicting requirements"* (370).

It is evident from these decisions that it was the duty of the Commission in this case, where its function was to protect the public interest, to grant a full hearing and to consider the effect of the granting of the application wherever it affected the public interest.

The dissenting opinion of Commissioner Eastman is important in this regard, because it shows that even with appellants' evidence ruled out, this Commissioner found that it was not established that granting the application was in the public interest. If appellants' testimony had been admitted, it might have brought other Commissioners over to Commissioner Eastman's views.

With these principles in mind as to what the Commission should consider, we wish to direct the Court's attention specifically to the character of the evidence which was excluded. As previously stated, the Commission found that one of the reasons why the granting of the application was in the public interest was that it would facilitate the construction of the Dotsero Cut-Off, because if the Rio Grande controlled the Moffat Road it would be easier for the two roads to reach an agreement. A reading of the Commission's opinion (Exhibit C, R. 17-34), compels the conclusion that the construction of the Cut-Off was one of the principal factors which influenced that decision. All evidence relative to the effect of the proposed acquisition upon the Dotsero Cut-Off was excluded by the Examiner. At the opening of the hearing the Examiner objected to references in the petitions of intervention of these appellants to the Dotsero Cut-Off, stating,

> "I am not hearing the Uintah case, the Dotsero Cut-Off or any of those cases (R. 62),

and frequently during the hearing the same statement was repeated by the Examiner.

The testimony of Mr. Williams, the principal witness for the Rio Grande, made frequent references to the Cut-Off. Appellants' counsel therefore began to inquire of Mr. Williams as to how the construction of the Cut-Off was to be financed. Without any objection being raised by any counsel present, the Examiner interrupted,

> "There is nothing about the financing of the building of the Dotsero Cut-Off before us in this proceeding. Don't go into that" (R. 74).

If we may be pardoned for going outside of the record in this regard, the subsequent history has shown that this inquiry was important, because the Rio Grande later had to secure a loan from the Reconstruction Finance Corporation before it could even start construction of the Cut-Off.

The pertinence of this inquiry is shown also by the Dissenting Opinion of Commissioner Mahaffie, concurred in by Commissioners Eastman and McManamy, to the order of the Commission in this case, 184 I. C. C. 721, as follows:

> "Because I was convinced that the Dotsero Cut-Off was highly desirable and that its construction would be assured if the Denver & Salt Lake were acquired by the Rio Grande, I voted to approve that acquisition. The Rio Grande cannot at present proceed with the acquisition. Nor with the construction. It asks further delay. It can promise nothing as to any definite program at the end of a future period of time. In the meantime, no one else can proceed. I have no reason to believe that the construction can be arranged in the near future, whether we grant or deny this request. But I believe we are not justified in permitting any further delay in order to see whether the Rio Grande can make good. It has already had a good deal of time and has not done so. Possibly some other interest can. Denial of this request would at least afford an opportunity to try. That opportunity, I think, should be made available."

It is conceded by all that there was a strong public demand that the Cut-Off be constructed. The Moffat Road had already made application for leave to construct the Cut-Off and had been denied that leave until it should reach a satisfactory trackage agreement with the Rio Grande. The only hearing on the Dotsero Cut-Off proposition was the one on the application of the Moffat Road. Here was a new situation where the Moffat Road was to be taken over by the Rio Grande and therefore the financing of the Cut-Off would be accomplished through the Rio Grande channels. There was therefore presented in this case an entirely new feature which could not possibly have been investigated in the previous cases, and it affected one of the principal grounds upon which it was contended that the granting of the application was in the public interest. Obviously, then, it was the duty of the Commission to permit the fullest investigation into this feature of the situation, instead of which all inquiry was barred.

As previously stated, the Moffat Tunnel was constructed as a public enterprise by the issue of bonds which are a lien upon all of the real estate in the Moffat Tunnel Improvement District. The total par value of these bonds almost equalled the investment account in Road and Equipment of the Moffat Road. The owners of real estate in this District certainly constitute an important part of the public whose interest the Commission must consider. The Examiner excluded all evidence relating to the history leading up to the Act under which the Tunnel was constructed, the purposes for which the Tunnel was constructed, and particularly evidence that the purpose of constructing the Tunnel was to insure the construction of the road beyond Craig, at least as far as the Colorado state boundary line.

Sufficient evidence was introduced to show that the Rio Grande had actively opposed the construction of any extension of the Moffat Road west from Craig. Therefore there was presented to the Commission a situation where the granting of the application would probably block any western extension of the Moffat Road. In balancing the public interest, as the Commission was required to do, it was ob-

viously necessary for the Commission to determine whether the benefits resulting from the granting of the application would offset the detriment to the territory which would be served by a western extension of the Moffat Road. In order to determine that, it was necessary to show what were the requirements of that territory, what were the traffic possibilities, and it was material to show that the territory had been built up largely on the promises made by the Moffat Road and public agencies that such railroad facilities would be furnished to that territory. All evidence of that character was excluded by the Examiner, and the exclusion went to such extreme lengths that after Witness Johnson had testified that Craig, the western terminal of the Moffat Road was only seven miles west of the eastern boundary of Moffat County, and he was asked by counsel for the appellants what the distance was from Craig to the western boundary, of Moffat County, an objection to the question was sustained by the Examiner and even such an innocent matter as that was excluded from the record.

The map contained in this record and the evidence shows that if a main line is created consisting of the Moffat Road from Denver to Orestod, the Cut-Off to Dotsero, and the Rio Grande road to Salt Lake, then that part of the Moffat Road beyond Orestod becomes merely a stub branch ending at Craig and having no connection with a main line except at Orestod. The Commission's reports are full of cases of abandonment of branch lines, including several cases in the State of Colorado. It therefore became very important for these appellants to consider whether traffic which could move either via the Moffat Road to points west of Orestod, or via the Rio Grande, could be diverted by the Rio Grande from the Moffat Road. If traffic could be so diverted, then it would be easy for the Rio Grande to create a situation which would justify an application to abandon the Moffat line west of Orestod. We therefore offered evidence to show that in connection with the building of the Hoover Dam, large quantities of construction material for use in constructing catch basins on the upper portions of the Colorado River, would be required, and this traffic could

easily be diverted by the Rio Grande from the Moffat Road to its own road. Also, we offered testimony to show that one of the principal items of the Moffat Road's traffic was coal from Routt County, and that this coal was competitive with coal from the western end of the Rio Grande road. Having in mind the part control of the Rio Grande by the Missouri Pacific, it will be easily seen that the Missouri Pacific's interests would be to move Utah coal over the Rio Grande to Pueblo and then over the Missouri Pacific to the Missouri River, and intermediate points, rather than to have coal from the Moffat Road come to Denver and then probably move to the Missouri River by one of the prairie lines reaching Denver (the Missouri Pacific does not reach Denver). The disastrous effect of such a shifting of the coal movement upon Routt County (the coal on the Moffat Road is principally located in Routt County, is very apparent. These appellants therefore were confronted with this threat, that whilst all of their property had been bonded to pay for the Moffat Tunnel, the value of their lands and of the industries in their counties might very easily be destroyed by the action of the Rio Grande if it got control of the Moffat Road. Surely these were material matters which the Commission should have considered in weighing the question of public interest, but all such evidence was excluded. Similar evidence was considered material by the Commission in Proposed Acquisition and Control of Virginian Ry., 117 I. C. C. 67.

> "The N. & W. controls the Pocahontas Coal & Coke Company, which owns 298,340 acres of the low-volatile coal lands of southern West Virginia. These coal fields are in competition with those served by the Pennsylvania Railroad in Pennsylvania. The testimony is that the Pennsylvania is the greatest coal-carrying road in the country, and that it has always opposed any great development of the New River and Kanawha, W. Va., fields. Certain of the protestants allege that the execution of the proposed lease would give to the Pennsylvania the means and power of stifling the development of the low-volatile fields of

southern West Virginia as competitors of the Pennsylvania fields; that the Pennsylvania's interest in the N. & W. is a constant menace to the southern West Virginia coal operator; and that the adding of the Virginian to the N. & W., as contemplated by the proposed lease, would be destructive to the public interest" (74-75).

"The Logan County Coal Operators' Association is composed of approximately 60 companies operating in Logan County, W. Va., on the Guyandot division of the C. & O. In 1925 the Logan district produced approximately 18,000,000 tons of high-volatile coal which moved both to eastern and western destinations. The Logan coal operators for years have desired a connection with and the operation of the Virginian by the C. & O. and have felt that the natural physical situation and location at some time would bring this about. It is testified that if the Virginian should be acquired by the C. & O. and a connecting line built from Gilbert to Elmore, it would shorten the distance for the movement of Logan coal to tidewater and eastern markets by approximately 138 miles. It is claimed by these protestants that if the N. & W. acquires the Virginian the natural result would be to deprive the mines in the Logan field of their eastern outlet, thereby stifling the growth and prosperity of this field" (80-81).

"The chief traffic official of the N. & W. testified that under unified operation of the Virginian and N. & W. the use of the Deepwater route would be discouraged, but that it would be kept open if found to be an efficient route. No reason appears why the N. & W. would be interested in maintaining a competitive through route via Deepwater, which would short haul its own traffic. As heretofore pointed out, a substantial volume of traffic moves through the Deepwater gateway, and this traffic would be increased largely if the Virginian should join the C. & O. in rates on westbound coal.

"Under the proposed lease all competition between the lines of the two companies would be eliminated. Important shipping points would be deprived of competitive service. The president of the Virginian testified that the elimination of competition in rates and service would injure any town through which the two roads pass, and this conclusion is corroborated by the testimony of the protestants" (84-85).

"Applications for authority to acquire control of railroads under the Interstate Commerce Act must be supported by a clear and strong showing of public gain. If serious doubt exists regarding the wisdom of the proposed grouping, that doubt must be resolved against the applications. Real and substantial advantages of railroad grouping are capable of reasonable proof. So are the disadvantages. There must be of record a substantial preponderance of evidence in favor of an application before we are warranted in giving it favorable consideration" (85).

In considering this situation it is important to recall the quotation from the Commission's own decision on its investigation of the Rio Grande, that under the domination of the Missouri Pacific it had neglected Colorado territory in order to foster a transcontinental line, and it was very apparent from Mr. Williams' testimony in this case that the controlling influence back of this application was the consideration of making the Rio Grande a link in a transcontinental line, and that that consideration outweighed all consideration of local interest.

We respectfully submit that it was the duty of the Commission to consider in this case all of the evidence that was offered concerning the needs of the territory between Craig, Colorado, and Provo, Utah, for railroad facilities, the traffic which that territory could offer, the purposes back of the public financing of the Moffat Tunnel, the probable effect upon a western extension of the Moffat Road of the Rio Grande control, and the effect of such control upon the value of the lands subject to the Moffat Tunnel assessments.

The question of the location of railroads and of extensions thereof, have always been regarded by the courts of this country as questions of public interest, and officers of railroads held as public agents in matters relating thereto,—Woodstock Iron Co. v. Richmond and D. Extension Co., 129 U. S. 643 (32 Law. Ed. 819)—and officers of railroads are forbidden to consider private advantages in such matters to the detriment of public interest. It therefore was certainly material to show in this case that public interest required the western extension of the Moffat Road, whereas the Rio Grande was interested in preventing such extension.

We submit that without a consideration of all of those factors the Commission could not be fully advised of the public interest and therefore could not determine whether the granting of the application was or was not in the public interest. We are not overlooking the statement of the lower court, that without the granting of the application there was

> "no immediate prospect of building the Cut-Off, which everyone wants, and certainly no prospect even remote of an extension of the Moffat Road from Craig to the west" (R. 129).

In that connection we direct the Court's attention to the fact that the record clearly shows that the Moffat Road had been ready since 1928 to build the Cut-Off, and that if it had not been for the objections of the Rio Grande, undoubtedly the Cut-Off would have been built and in operation long since. The pessimistic attitude of the lower court as to the extension west of Craig, that there is "certainly no prospect even remote of an extension," seems to us to be hardly warranted. The exhibits of record show that in round figures, the net income of the Moffat Road for 1926 was $323,000 deficit; 1927, $132,000 deficit; 1928, the first year the road began operating through the Tunnel, and after paying the Tunnel rentals, $392,000 surplus; and in 1929, after paying the Tunnel rentals, $610,000 surplus. Such a showing seems to justify Mr. Moffat's original idea that this road could be made a successful paying road. Further in this regard, without either the Commission or the Court hearing as to

what the traffic possibilities are in the territory beyond Craig, it is difficult to find that the western extension is not justified and is not even remotely probable. Further, the statement of Commissioner Eastman (Ex. C, R. 35) is pertinent on this point:

> "On the other hand, the evidence indicates that the Denver & Salt Lake, if it were allowed to remain as an independent carrier, would be in a reasonably strong position. Its earnings are now good enough, if the majority are right, to justify the payment of $155 per share for its common stock. At its eastern end, it connects with the Union Pacific, the Burlington, and the Rock Island, the last two roads, particularly the strong Burlington system, having no adverse interest which conflicts with the development of the new Denver route. At its western end, it is to be connected, by a comparatively small expenditure and under authority which we have already granted, with the Denver & Rio Grande Western, *and there is also the possibility of an extension west from Craig to Salt Lake City. This was a part of the original project, and it is not to be dismissed as an impracticable plan, particularly if one of the eastern connections of the Denver & Salt Lake should be interested in it.* As an independent carrier, also, the Denver & Salt Lake would, I believe, be in a better position to negotiate divisions with connections than if it becomes a minor satellite of the Missouri Pacific system."

In any event, those were all matters which should have been considered by the Commission before determining to hand over this prosperous local Colorado road to the Rio Grande, controlled by the Missouri Pacific and the Western Pacific, neither of which is in any manner interested in northwestern Colorado.

In this connection we direct the Court's attention to the statement of the lower court,

> "Realizing that much of this controversy had already been decided by the Commission in the previous Cut-Off proceedings, the Examiner was firm in holding the examination to the single ultimate question of public interest involved in the proposed stock purchase and control of one railrad by the other" (R. 129).

This statement of itself convicts the Examiner of proceeding directly contrary to the decisions of this Court. In B. & O. R. R. v. United States, *supra*, at page 263, this Court says:

> "Facts conceivably known to the Commission, but not put in evidence, will not support an order."

In United States v. Abilene & Southern R. Co., 265 U. S. 274 (68 Law. Ed. 1016), this Court says:

> "The objection to the use of the data contained in the annual reports is not lack of authenticity or untrustworthiness. It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made. The requirement that, in an adversary proceeding specific reference be made, is essential to the preservation of the substantial rights of the parties.
>
> "The right of the carriers to insist that the consideration of matter not in evidence invalidates the order was not lost by their submission of the case without argument, and by their acquiescing in the suggestion that the presentation of a tentative report by the Examiner be omitted. While the course pursued denied to the Commission the benefit of that full presentation of the contentions of the parties which is often essential to the exercise of sound judgment, it cannot be construed as a waiver by the carriers of their legal rights. The general notice that the Commission would rely upon the voluminous annual reports is tantamount to giving no notice whatsoever. The matter improperly treated as evidence may have

been an important factor in the conclusions reached by the Commission. The order must, therefore, be held void" (289-290).

In Interstate Commerce Commmission v. Louisville & N. R. R. Co., 227 U. S. 88 (57 Law. Ed. 431), this Court said:

> "On the appeal here, the government insisted that while the act of 1887 to regulate commerce (24 Stat. at L. 379, Sections 14-16, chap. 104, U. S. Comp. Stat. Supp. 1911, p. 1284) made the orders of the Commission only prima facie correct, a different result followed from the provision in the Hepburn Act of 1906 (34 Stat. at L. 584, Sec. 4, Chap. 3591, U. S. Comp. Stat. Sup. 1911, p. 1297) that rates should be set aside if after a hearing the 'Commission shall be of the opinion that the charge was unreasonable.' In such case it insisted that the order based on such opinion is conclusive, and (though Interstate Commerce Commission v. Union P. R. Co., 222 U. S. 547, 56 L. Ed. 311, 32 Sup. Ct. Rep. 108, was to the contrary) could not be set aside, even if the finding was wholly without substantial evidence to support it.
>
> "1. But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had the power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, *quasi* judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence'" **(91)**.

If, therefore, the theory of the Examiner was, as indicated by the lower court, that all of the evidence which we proposed to offer was before the Commission in other cases, and that the Commission could draw on its knowledge thus gained, then clearly the hearing violated the law as laid down by this Court in the cases above referred to.

In this connection it is also material to again direct the Court's attention to the fact that in the Dotsero Cut-Off hearing these appellants were not represented for the reason that they were not disposed to object to the Moffat Road building the Cut-Off, but when it is proposed that the Rio Grande should build the Cut-Off, the situation is entirely changed. There has been no hearing upon the question of the public interest in the building of the Cut-Off by the Rio Grande.

It is only fair to the Commission to assume that it decided this matter upon the record as made at the hearing without reference to the matters contained in the other cases which had been presented to it. Therefore it decided this case without any information upon the matters which were excluded from the hearing. If such be the case, we submit that there has not been that full hearing of the public interests involved in this case as is required by the statute.

D.

That if Material Evidence Was Excluded When Offered by Other Interests, Appellants Were Not Required to Re-Offer the Same Evidence in Order to Complain of Its Rejection.

The lower court states in its opinion:

> "An analysis of the hearings indicates that *some* of the matters excluded were not offered in evidence by plaintiffs' counsel but by counsel representing other

> interveners of which we think plaintiffs cannot avail themselves in this suit. These were matters for the others to complain about" (R. 129).

These appellants were practically the last interests to present evidence at the hearings, consequently before they proceeded with their testimony the Examiner had clearly outlined his position as to what testimony he would not admit. For example, the record shows that Mr. Rogers, appearing for the Denver Chamber of Commerce, was attempting to go into the history leading up to the construction of the Moffat Tunnel and its bearing on the proposed extension westward from Craig to connection with Utah points, and the Examiner was excluding all testimony bearing upon that history. Thereupon the following took place:

> "Examiner Davis: The basis you may ask but I do not care to go into the history.
>
> "Mr. Vogl: Mr. Examiner, may the record here show that we save an exception?
>
> "Examiner Davis: It is unnecessary but you can show it" (R. 79).

At the opening of the hearing, the Examiner stated:

> "Now, in taking testimony, testimony in its general nature which is merely cumulative will not be taken. Now, that rule will be strictly enforced, and you will govern yourselves accordingly" (R. 63).

During the examination and cross-examination of various witnesses by Mr. Rogers, the Examiner very definitely showed what character of testimony he would exclude as being immaterial. Thereupon counsel for these appellants stated:

> "Mr. Examiner, in order to avoid having to repeat, may the record show on behalf of the Moffat Tunnel League and the Uintah Basin Railroad League that we want the same testimony upon this further point: that one of the matters to be considered in this matter is the future operations of the Tunnel, and the finances of the Tunnel Commission at this time will have a bearing on whether or not we are to be

further taxed for the support of the Tunnel, and therefore it is material in that issue.

"Examiner Davis: I will let the record show that you request that but it will be the same ruling" (R. 83).

Certainly it would have cumbered the record unnecessarily after the Examiner had excluded testimony when offered by Mr. Rogers, if we had gone through the process of again offering the same testimony through other witnesses. This Court appreciates that hearings before the Interstate Commerce Commission are more or less informal, and once a certain line of testimony has been excluded we submit that it was not necessary for these appellants to re-offer the same testimony. However, it will be noticed that most of the exclusion of which we are here complaining was of testimony offered by these appellants.

We submit that due regard for orderly proceeding required that when the Examiner had clearly ruled upon the admissibility of a certain class of testimony, that ruling applied to all parties, and all parties could complain of it, if the ruling was wrong.

MISCELLANEOUS.

Before closing this brief it may be in order to refer briefly to some incidental matters which have been referred to in the record in this case.

We have pointed out that one of the grounds upon which the Commission found that granting of the application was in the public interest, is that it harmonizes with the Commission's consolidation plan. This suggests the propriety of a brief outline of the history leading up to the alignment of the Moffat Road in that consolidation plan.

In Professor Ripley's report to the Interstate Commerce Commission on Consolidation of Railroads, under Section 5, Paragraph 4 of the Interstate Commerce Act, which report is attached to the Tentative Plan of the Commission on Consolidation of Railroads, reported in 63 I. C. C. 455, concerning the Denver & Salt Lake Road, Professor Ripley says the following:

"The Colorado situation must be examined in detail. * * * * The bulwark of the Rocky Mountains behind Denver is bound to be overcome before long by the construction of a penetrating direct line toward Salt Lake City. The need of such provision of a through route is imperative, not only for the upbuilding of Denver, but for the satisfaction of national commercial needs. It is not alone that the roundabout twist by way of Pueblo is a waste of distance. The route through by Pueblo, by reason of physical obstacles of grade and curvature, can never be brought to first-class transcontinental standards. It is probably in order to supply this need that the Denver & Salt Lake City project has been so persistent, in the face of seemingly insuperable obstacles. Its location as a short cut west of Denver is shown by a distinctive designation on map 16. The original project for a through line to Salt Lake City follows the river course out through the northwestern corner of Colorado. But it is said to be feasible, by a short and not difficult piece of construction, to leave the Denver & Salt Lake at McCoy, by the dotted line on the map and to reach the Denver & Rio Grande at Dotsero, Colo. Thus the most difficult portions of the Denver & Rio Grande line are avoided. The heavy grades at Tennessee Pass and Palmer Lake would be eliminated. By a short construction of 40 miles, the roundabout route by way of Pueblo would be reduced by 175 miles. The remainder of the Denver & Rio Grande on to Salt Lake City is almost all water grade and could readily be fitted to carry the Burlington load of traffic.

"But the Denver & Salt Lake Railroad itself is a formidable project, especially where it cuts through the continental divide by the proposed James Peak tunnel. At present its grades and curvatures are prohibitive. In 1913 the Denver tunnel commission estimated a cost of $4,420,000 and a necessary period of possibly five years. The city of Denver authorized $3,000,000 of bonds, but the Colorado supreme court in 1914 declared the authorization to be illegal. Since

that time nothing has been accomplished, although a referendum vote in 1920 rejected the project as municipal enterprise by a narrow margin. It seems quite possible that with strong financial support, and the promised traffic which could be guaranteed by a great system, a combination of public and private enterprise might bring the project to a fruition. Thus might the great investment in an admirable new trunk line west of Denver to a junction at Salt Lake City with the Western Pacific be made available as a national asset" (591-2).

The Commission in its tentative plan did not include the Moffat Road with any of the proposed systems, nor did it include the Rio Grande with the Missouri Pacific, but made it a part of the Santa Fe system.

In the Commission's final plan of consolidation, 159 I. C. C. 522, The Moffat Road is included as part of System No. 18, the Missouri Pacific System, which includes the Rio Grande. This opinion was the first notice to the public that the Commission was considering lining the Moffat Road with the Rio Grande. Thus it appears that there has never been afforded to the interested public an opportunity of considering or giving to the Commission its views on the propriety of including the Moffat Road with the Rio Grande.

The lower court seemed to attach some importance to a contrast of the official character of some of the interveners in this case, such as the Tunnel Commission, The Public Utilities Commission of the State of Colorado, with the character of the appellants' organizations. This case presents legal issues and the official standing of the various parties seems to us to be immaterial. However, since the lower court referred to that matter, we refer this Court to Chap. 64, Session Laws of Utah, 1931, in which the Utah State Legislature appropriated money "for the use of Uintah Basin Railroad League", showing the official standing of that League, and the testimony of Witness Johnson (then a State Senator, and now Governor of the State), that the County Commissioners of Grand, Routt and Moffat Counties had requested the Moffat Tunnel League to represent them in this proceeding.

Probably it will be suggested that the provision in the Commission's order that the Rio Grande will, through the Moffat Road,

> "Establish such through routes in connection with any western connection hereafter constructed under our authority as we may find in a subsequent proceeding or proceedings to be reasonable and in the public interest" (R. 29-30),

is a sufficient protection to these appellants. In view of the decision of this Court in U. S. v. Missouri Pacific Ry. (Subiaco Case), 278 U. S. 269 (73 Law. Ed. 322), this provision is by no means sufficient to protect anyone contemplating building such extension. A contrast of this condition with that made by the Commission in Clinchfield Railway Lease, 90 I. C. C. 113 (133-4), affirmed Atlantic Coast Line R. Co. v. U. S., 284 U. S. 288 (76 Law. Ed. 298), emphasizes this point. The provision in the Clinchfield case was:

> "4. The applicants shall permit the line of the Clinchfield and its subsidiaries to be used as a link for through traffic, via existing gateways of interchange, *or via such gateways as may hereafter be established under authority of the commission by means of the connecting lines which the Louisville & Nashville Railroad Company proposes to build, equally available to such other carriers, now connecting, or which may hereafter connect, with the line of the Clinchfield and its subsidiaries, as may desire to participate in through routes and joint rates between points in territory north and west of the line of the Clinchfield* and points at and beyond the Ohio River on the one hand and points in the southeastern and Carolina territory on the other, under divisions to be agreed upon by the applicants, or either of them, and/or the Clinchfield organization, on the one hand, and by the other participating carrier or carriers on the other, and shall not discriminate as to rates, fares, and charges against such participating carrier or carriers as compared with the applicants, or either of them; the intention of this provision being that the line of the Clinchfield and its subsidiaries shall

> be maintained as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated."

This Court held that the Commission could require a carrier, as a condition to authority to lease the line of another carrier, to surrender its right to insist upon its "long haul" under Section 15(4) of the Interstate Commerce Act. That is what the Commission did require in the Clinchfield case (*supra*), but the provision in this case, which reads,

> "establish such through routes in connection with any western connection hereafter constructed under our authority as we may find in a subsequent proceeding or proceedings to be reasonable and in the public interest" (R. 29-30).

falls far short of any such requirement. It is quite apparent that if the Rio Grande controls the Moffat Road it will insist upon its rights under said Section 15(4) and under such conditions no independent interests will build an extension between Craig and Salt Lake City.

CONCLUSION.

For the reasons hereinbefore urged, we respectfully submit that the decision of the lower court should be reversed and the order and decision of the Commission should be enjoined.

Respectfully submitted,

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